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No. 93-1918

In the
Supreme Court of the United States
October Term, 1993

Eddy Lankford,
Petitioner,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

Counsel for both parties have consented to the filing of the within brief. Letters of consent are on file with the clerk.

INTEREST OF *AMICI*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands, the Territory of Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy. The organization sees the issues involved in the case at bar as of the utmost importance to its members and to the students in their charge.

The principles established by the lower court, if left standing, could significantly expand liability of local school boards and school officials for alleged negligence of school personnel in failing to protect students. Given the perceived "deep pockets" of school districts and their supervisory employees, plaintiffs will seek damages in federal courts under 42 U.S.C. § 1983, for injuries to students inflicted by the perpetrators, who are "judgment proof." *Amici* believe that it is critical to the efficient conduct of public education and maintenance of public confidence and support in public schools that school administrators be free to exercise their professional judgment on behalf of students and teachers alike without subjecting themselves and their boards to potential liability for the injury which a student may suffer as the result of the criminal acts of others. In short, neither the board nor its administrators should be

made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

For school districts the implications of the decision in this case are vast. The same analysis used by the lower court in the case at bar is being followed by numerous other courts to hold school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions

which, if true as alleged, were nothing more than negligent.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. *Amici* and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, *Amicus* NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board

members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse. State laws that require reporting of suspected child abuse should also grant immunity for liability for reports made in good faith. School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA's Council of School Attorneys has recently published a monograph entitled *Child Abuse: Legal Issues for Schools*. A copy of the publication is lodged with the Clerk.

The lower court's zeal to compensate Respondent for her devastating injury is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public employee. The

lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the criminal context.

I. New constitutional rights should be established by this Court and not by courts of appeals. This Court's continued silence on the issue of whether students have a substantive due process right to bodily integrity in the schools, is being misconstrued by lower courts to allow conversion of state tort actions into Fourteenth amendment cases.

A. Although this Court has never held that students have a substantive due process right to bodily integrity, the Fifth Circuit in the instant case holds that the right is "clearly established."

1. The Fifth Circuit's determination of a new constitutional right does not coincide with this Court's

historically sparing use of substantive due process analysis to protect interests in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The concept of "substantive due process" encompasses fundamental rights expressly enumerated in the Constitution, *e.g.*, the First Amendment rights of free speech and assembly and free exercise of religion, and interests in the penumbra of enumerated rights, such as the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives) interpreted to be in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

(involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In *Wood v. Strickland*, 420 U.S. 315 (1975), the Supreme Court vacated the judgment of the court of appeals which found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court stated that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a *per curiam* opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. *Board*

of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a

> background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing *Poe v. Ullman*, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

2. The Fifth Circuit's decision and other lower court holdings on this issue exceed the limits established by this Court's decisions holding government officials responsible for bodily injuries to individuals only in situations where the state has *affirmatively* restrained the individual either in prison or through involuntary commitment to an institution.

The Fifth Circuit's ruling in this case has no basis in any ruling of the U.S. Supreme Court. All but one of this Court's decisions holding public officials liable for personal injuries to individuals are criminal cases, based either on the Eighth Amendment's proscription against cruel and unusual punishment or on the duty to provide medical care to detained individuals. The exception is *Youngberg v. Romeo*, 457 U.S. 307 (1982),

which upheld state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure the individual's safety and to facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be

"confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other administrators and teachers. Furthermore, most of the acts of the perpetrator in this case occurred outside the school.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a belief that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which

she cannot extricate herself? In this case, the answer to that question has to be in the negative.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court emphasized that without *affirmative* state restraint on individual freedom there is no substantive due process violation. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury. The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The court in this case distinguished *DeShaney* on the ground that the case involved a private wrongdoer. However, nothing in this Court's decisions indicates an intent to make that distinction.

The lower court decisions on this subject take one of two tracks, by holding either that there is a duty to protect arising from the "special relationship" created by compulsory attendance laws or that there is a substantive due process right to bodily integrity in the schools. The two court of appeals decisions in this case evidence the two theories.[1] Both

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[1] The panel decision in this case which was vacated by the court *en banc*, 975 F.2d 137 (5th Cir. 1992), held that there is a duty to protect students in the public

theories are premised on misinterpretations of this Court's decisions.

For example, in the leading case on the subject of sexual abuse of students, *Stoneking v. Bradford Area School District (Stoneking I)*, 856 F.2d 594 (3rd Cir. 1988), *vacated* and *remanded*, 109 S.Ct. 1634 (1989), the Third Circuit held that female students in a public school have a constitutional right to be free from sexual abuse by a school employee and that the "special relationship" between the students and the school districts based on the state's compulsory attendance laws gives rise to a duty to investigate the allegations and to take steps to protect the students.[2]

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schools. The *en banc* decision held that there is a substantive due process right to bodily integrity in the schools to which the pleadings show the principal was "deliberately indifferent."

[2] This Court vacated and remanded that decision in light of *DeShaney*. On remand, the court reached the same conclusion but without using the "special relationship" analysis. (See discussion, *infra* at 22).

The *Stoneking I* decision derived from the erroneous view that this Court established a substantive right to be free from physical abuse in school in *Ingraham v. Wright*, 430 U.S. 651 (1977). That case raised the issue of whether excessive corporal punishment in the schools implicates the Eighth Amendment's proscription against cruel and unusual punishment. The Court held that, unlike prisoners, injured parties in the public schools have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

430 U.S. at 670.

The Court agreed that students have a liberty interest in bodily integrity which is protected by procedural due process, but the Court explicitly stated that it was not ruling on the question of whether substantive due

process is implicated by excessive corporal punishment.

It should be noted that a much stronger case could be made for the proposition that corporal punishment implicates substantive due process, given the fact that the corporal punishment is officially sanctioned while the sexual abuse at issue here furthers the personal objectives of the perpetrator and violates specific school policies. Nevertheless, the "openness of the schools" argument should still prevail to differentiate students from prisoners and nothing in *Ingraham* supports the contention that student have a substantive right in their bodily integrity.

3. The Fifth Circuit's implicit reliance on *Rochin v. California* analysis which this Court has reserved for criminal cases is inappropriate for determining liability of school districts and school supervisors for the conduct of subordinates in pursuit of the latter's personal heinous objectives.

A number of lower court decisions[3] cite this Court's decision in *Rochin v. California*, 342 U.S. 165 (1952), for the proposition that "a state actor [cannot] use means which 'shock the conscience' in the name of the public good." These courts contend that *Rochin* supports the finding of a constitutional tort where a school employee's actions were so outrageous as to "shock the conscience" of the court. It is a tremendous leap from *Rochin* and the criminal cases following it to the case at bar where the employee's conduct furthers his personal interests and conflicts with the interests of the state. Shocking conduct of school employees does not *by itself* give rise to constitutional liability for that conduct.

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[3] The Fifth Circuit panel decision in this case cited *Rochin* directly and the full court supports its ruling with lower court cases that can be traced back to *Rochin*. Pet. App. A at 73a (Jones, C.J. dissenting).

There may be a fact situation where it would be appropriate to hold the school officials liable for conduct which "shocks the conscience," where the school "in the name of the public good," officially imposes punishment on children which is "too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172. But those facts are not before the Court in this case.

B. Even though this Court has never applied the "deliberate indifference" standard outside the criminal context, the Fifth Circuit and other lower courts are using that standard to hold school officials liable for bodily injuries to students.

The court of appeals held that plaintiff pled sufficient facts to demonstrate Lankford's "deliberate indifference" to the acts of the molesting employee. The "deliberate indifference" standard for holding supervisors liable for tortious acts of government employees was first announced by

this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). That case held that the state violates the Eighth Amendment's proscription against cruel and unusual punishment where it is "deliberately indifferent" to the "serious" medical needs of a prisoner.

In *City of Canton v. Harris*, 489 U.S. 381 (1989), the Court used the "deliberate indifference" standard in a somewhat different context where an individual was in custody but had not yet been convicted. In that case the Court held that a city could be held liable where its failure to train amounts to "deliberate indifference" to the due process right of detainee to receive medical attention. This Court has never, however, applied the "deliberate indifference" standard outside the criminal context nor in any context other than the right to medical attention.

Nevertheless, numerous lower court cases, including the case at bar, are applying that

standard to hold school districts liable for bodily injuries to students where the only official act of the school district is the mere introduction of the student to the offending party.

The leading school case in which the "deliberate indifference" standard was applied is the second *Stoneking* case, *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990). After this Court vacated and remanded *Stoneking I* in light of *DeShaney*, the Third Circuit Court of Appeals mused that it had the option of continuing to rest its decision on a duty to protect arising out of the "special relationship" created by the state's compulsory education laws. However, because of the "uncertainty of the law in this respect," the court instead ruled that the officials acted with "deliberate indifference" to the constitutional rights of the students through a custom that communicates condonation

of the behavior. The court again erroneously cited *Ingraham v. Wright* for the proposition that students have a substantive right to be free from sexual molestation.

Lower courts usually apply the "deliberate indifference" standard to hold school districts and supervisory employees liable in cases brought by students against their schools for damages under Section 1983 as the result of tortious conduct by school employees or other students. Even those cases which do not reach the question of whether there is a constitutional right to bodily integrity in the schools, apply the deliberate indifference standard in determining whether supervisory employees and the school district itself can be held liable under Section 1983 for assaults on students.

In *J.O. v. Alton Community Unit School Dist.*, 909 F.2d 267 (7th Cir. 1990), although holding that compulsory school attendance laws do not render students unable to care for

themselves to the extent that an "affirmative duty to protect that individual arises," the court nevertheless ruled that plaintiffs should be allowed to amend their complaint to allege that the school was deliberately indifferent to the safety of students because school policies "encourag[ed] a climate to flourish where innocent [children] were victimized." *See also Gates v. Unified School Dist. No. 449*, 996 F.2d 1035 (10th Cir. 1993); *Thelma D. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *Jane Doe A. v. Special Sch. District*, 901 F.2d 642 (8th Cir. 1990).

The standard has also been employed or cited with approval in cases involving assaults upon students by other students. The court below cites *Lopez v. Houston*, 817 F.2d 351 (5th Cir. 1987), in which the Fifth Circuit held that, although there was no evidence that the school district's training program was sufficiently lacking to rise to the level of "deliberate indifference," a

school bus driver could be held liable for his failure to protect the plaintiff from attacks by other students on the school bus if he was "grossly negligent or deliberately indifferent." Similarly, in *Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D. N.Y. 1989), the court held that the school district's failure to take preventive steps to protect a student from verbal and physical abuse by other students rose to the level of "deliberate indifference." And in *Williams v. City of Boston*, 784 F.2d 430 (1st Cir. 1986), the court held that in order to prevail against school officials, a student who was shot at a high school football game must show that the school officials were "deliberately indifferent" in failing to establish a custom or policy of adequate security at school events. In *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1266 (1993), the court refused to conclude that compulsory attendance

laws give rise to a constitutional duty with regard to a teacher's duty to protect a student who strangled in an unattended cloakroom adjacent to the teacher's classroom, but the court implied that there might be an independent basis for liability against the principal and superintendent under the *Stoneking II* "deliberate indifference" standard. In *Dorothy J. v. Little Rock School Dist.*, the court cited to the "deliberate indifference" standard in the panel decision in this case and stated that "no such pattern is alleged in this case." 7 F.3d 729, 732 n.2 (8th Cir. 1993).

Neither the Fifth Circuit nor any of the other courts which have applied the "deliberate indifference" standard to schools have offered an explanation as to how they made the exponential leap from this Court's decisions concerning the duty to provide medical care to prisoners and detainees, to

the non-criminal context. Certainly, this Court has never made that leap.

The Court had occasion to rule directly on this question in *Youngberg v. Romeo, supra.* In that case the Court ruled that although the state owes a duty to incarcerated mental patients to provide safe conditions, the trial court erred in its use of the "deliberate indifference" standard in its instruction to the jury.

> The "deliberate indifference" standard was adopted by this Court in *Estelle v. Gamble*, [citations omitted], a case dealing with prisoners' rights to punishment that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to *Estelle v. Gamble* in charging the jury, it erroneously used the deliberate indifference standard articulated in that case.

457 U.S. at 312, n. 11.

In *City of Canton v. Harris, supra*, this Court expanded the "deliberate indifference" standard to include inadequate training of police officers and lower courts are now

misapplying *City of Canton* and other Section 1983 cases to hold school districts liable for tortious acts of employees.

The Fifth Circuit's ruling leaves open the door to lawsuits making a "federal case" out of any injury in the schools, from assaults by students on students or employees; injuries resulting from defective equipment (athletic, shop, etc.) or defective facilities; or injuries allegedly resulting from inadequate supervision. Any state tort action can thus be transformed into a constitutional case. Even in cases involving incarcerated prisoners, this Court has held that the due process clause is not implicated by mere negligence of a public official.

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth amendment would trivialize the centuries-old principle of due process of law.

Daniels v. Williams, 474 U.S. 327, 332 (1986).

If, indeed, there is a substantive due process right to bodily integrity, that does not legitimize the ruling of the court below or, indeed, the rulings of most of the lower courts on this subject. In order to violate the constitutional right it would seem that the state would have to knowingly place a child in an unsafe environment from which the student cannot extricate himself.

II. The Fifth Circuit's opinion unnecessarily expands substantive due process since students' liberty rights to bodily integrity are already adequately protected through state tort law.

Most states have statutorily waived the immunity of school districts from suit for the grossly negligent acts of public employees resulting in physical injury to students. Individual school employees probably would not be immune from liability if sued in their individual capacity even in those states where sovereign immunity has not been waived.

In the event that a case arises where the state does not permit a cause of action for gross negligence of a public official which implicates a student's liberty interest in bodily integrity, this Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process. But that is not a valid reason for converting the liberty interest into a substantive due process right.

III. The Fifth Circuit ruling involves an issue that requires clarification from this Court.

A. The decisions of five circuits that have ruled on the issue of liability of school districts and school officials for bodily injuries to students have created a disarray of constitutional analysis that can only be resolved by this Court.

As the foregoing discussion demonstrates the substantive due process issue raised in these cases is very complex, and many lower courts do not even attempt to develop a cogent analytical base for their decisions, making it difficult for schools and their counsel to

follow the cases in developing a legal defense. Despite this Court's hesitance in finding new substantive due process rights, these courts use substantive due process as a constitutional "catch all" to hold schools liable under Section 1983 for injuries to students which do not fall neatly into explicit constitutional niches. In so doing, lower courts are expanding beyond their bounds this Court's rulings in *Ingraham v. Wright*, 430 U.S. 651 (1977), *Estelle v. Gamble*, 429 U.S. 97 (1976), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *DeShaney v. Winnebago*, 489 U.S. 189 (1989), and *Rochin v. California*, 342 U.S. 165 (1952), to make schools strictly liable for injuries to students. Only this Court can settle the scope of these rulings and their applicability to such cases.

CONCLUSION

The holding below is a substantial departure from the decisions of this Court which are cited in its support. School

districts and school administrators and their attorneys across the country need guidance from this Court on these important issues.

Amici urge this Court to review this case.

Respectfully submitted,

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